



BILLINGS GAZETTE

## Recall provisions too narrow for Lenington case, report finds



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Is a racist slur by Yellowstone County Treasurer Max Lenington or his repeated personal use of county emails grounds for a recall?

Not under Montana law, said the County Attorney's Office, which investigated the issue.

Chief Deputy County Attorney Dan Schwarz, who heads the civil division, said Monday that grounds needed for a recall petition are not present under the current facts regarding

Lenington's actions.

The findings are contained in a four-page legal analysis presented to the county commissioners during their discussion meeting. The commissioners, who have called for Lenington to resign, took no action.

The County Attorney's Office investigated whether Lenington's activities constituted official misconduct or if he violated his oath as an elected official.

Lenington, who also is the county's assessor and superintendent of schools, has come under fire since a Billings Gazette public information request showed that he used his government email account to send racist and bigoted messages and to conduct personal business with a motorcycle purchase.

The county attorney is responding to two other records requests regarding Lenington from The Gazette and they are not included in Monday's analysis, Schwarz said.

Lenington, 69, last week responded to calls for his resignation by saying he will retire at the end of his term in 2014. He started working in county government in 1969, earns \$90,054 a year and supervises about 25 people.

Lenington, who received a copy of the legal memo from the County Attorney's Office, said he was not surprised by the conclusion and that he doesn't believe his conduct is grounds for a recall.

Lenington also said emailing is like using the telephone or any other communication device and that there are times when he gets personal emails.

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In a Nov. 13, 2012, email from his government account, Lenington said that President Barack Obama must have been re-elected because "...there are more lesbians, queers, Indians, Mexicans and n----- than the rest of us!" (The Gazette has chosen not to completely reproduce the word Lenington used.)

Lenington apologized for using the "N-word" and blamed the controversy over his words on "the liberal left-wing news media," which he accused of "purposely and intentionally deceiving us and not telling the truth" about Obama. He accused news media of trying to censor his First Amendment rights regarding his emails.

The investigation also turned up more than 30 messages detailing negotiations for the purchase of an \$11,000 customized Triumph motorcycle from an Iowa dealer. Those emails occurred between Oct. 18, 2012, and Jan. 24, 2013.

A recall petition is "solely up to the electorate" but that the court is "the ultimate authority" on whether recall grounds are met, Schwarz said.

Montana law is clear on grounds for recall, Schwarz said. The grounds are lack of mental or physical capacity; incompetency; violation of oath of office; official misconduct; or conviction of a felony offense.

The analysis focused on official misconduct, oath of office and incompetence, Schwarz said. Mental or physical fitness or a felony conviction does not apply to the Lenington matter, he said.

Official misconduct also does not apply, Schwarz said.

Lenington's emails do not "sufficiently show that a duty was criminally neglected" and there is no evidence that the derogatory emails gave Lenington or another person an advantage, he said.

Further, while Lenington has said his remarks about the president were part of his job to inform the public, his statements "are not legally forbidden," Schwarz wrote. "One can question the necessity or advisability of a local government official to engage in this discussion rather than tending to property tax issues, motor vehicle or school issues, but one cannot argue with an elected official's First Amendment right," he said.

Lenington didn't seek or receive an award to issue his derogatory emails, and there was no allegation that he held an illegal public meeting, both of which could be grounds for misconduct, Schwarz said.

Lenington's remarks also do not violate the Montana or U.S. constitutions, which he swore to uphold in his oath of office, Schwarz said.

Incompetency, he said, generally refers to a person who is incapable of managing his affairs because of mental incapacity. While many may argue that Lenington's derogatory emails "lend themselves to this definition," Schwarz said, it is unlikely the emails, by themselves, would establish sufficient legal basis that Lenington is unfit for his offices.

The Montana Legislature has limited the grounds for recall and provided the District Court with the authority to review recall petitions for legal sufficiency, Schwarz said.

Schwarz called it "unlikely" that a court would find the derogatory emails sufficient to support a recall petition.

Whether Lenington's repeated use of the county's email system to buy a motorcycle violated the county's excessive-use policy is an investigation that the commissioners must order, Schwarz said.

"There has been no formal declaration that these emails violated County policy," he said.

Even if the commissioners were to find that Lenington violated policy, such a violation would not be grounds for a recall, Schwarz said.